

PROVISIONS NOT AFFECTED BY PUB. L. 103-355

This section not to be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under former 40 U.S.C. 759 or chapter 11 of Title 40, Public Buildings, Property, and Works, see section 1004(d) of Pub. L. 103-355, set out as a note under section 2304a of this title.

§ 2304e. Contracts: prohibition on competition between Department of Defense and small businesses and certain other entities

(a) EXCLUSION.—In any case in which the Secretary of Defense plans to use competitive procedures for a procurement, if the procurement is to be conducted as described in subsection (b), then the Secretary shall exclude the Department of Defense from competing in the procurement.

(b) PROCUREMENT DESCRIPTION.—The requirement to exclude the Department of Defense under subsection (a) applies in the case of a procurement to be conducted by excluding from competition entities in the private sector other than—

(1) small business concerns in furtherance of section 8 or 15 of the Small Business Act (15 U.S.C. 637 or 644); or

(2) entities described in subsection (a)(1) of section 2323 of this title in furtherance of the goal specified in that subsection.

(Added Pub. L. 103-160, div. A, title VIII, § 848(a)(1), Nov. 30, 1993, 107 Stat. 1724, § 2304a; renumbered § 2304e, Pub. L. 104-106, div. D, title XLIII, § 4321(b)(6)(A), Feb. 10, 1996, 110 Stat. 672.)

AMENDMENTS

1996—Pub. L. 104-106 renumbered section 2304a of this title as this section.

EFFECTIVE DATE

Pub. L. 103-160, div. A, title VIII, § 848(b), Nov. 30, 1993, 107 Stat. 1725, provided that: “Section 2304a [now 2304e] of title 10, United States Code, as added by subsection (a), shall take effect on the date of the enactment of this Act [Nov. 30, 1993].”

§ 2305. Contracts: planning, solicitation, evaluation, and award procedures

(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall—

(i) specify the agency’s needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which—

(i) consistent with the provisions of this chapter, permit full and open competition; and

(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(i) function, so that a variety of products or services may qualify;

(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(iii) design requirements.

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(A) a statement of—

(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and

(ii) the relative importance assigned to each of those factors and subfactors; and

(B)(i) in the case of sealed bids—

(I) a statement that sealed bids will be evaluated without discussions with the bidders; and

(II) the time and place for the opening of the sealed bids; or

(ii) in the case of competitive proposals—

(I) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and

(II) the time and place for submission of proposals.

(3)(A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—

(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

(ii) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

(iii) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—

(I) significantly more important than cost or price;

(II) approximately equal in importance to cost or price; or

(III) significantly less important than cost or price.

(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms “significantly more important” and “significantly less important” as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

(4) Nothing in this subsection prohibits an agency from—

(A) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(B) stating in a solicitation that award will be made to the offeror that meets the solicitation’s mandatory requirements at the lowest cost or price.

(5) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals and make an award based solely on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids in accordance with paragraph (1) without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within three days after the date of contract award, the head of the agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(4)(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract—

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(B) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under sub-

paragraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

(C) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within three days after the date of contract award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals. This subparagraph does not apply with respect to the award of a contract for the acquisition of perishable subsistence items.

(5)(A) When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The head of the agency shall debrief the offeror within, to the maximum extent practicable, five days after receipt of the request by the agency.

(B) The debriefing shall include, at a minimum—

(i) the agency’s evaluation of the significant weak or deficient factors in the offeror’s offer;

(ii) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(iii) the overall ranking of all offers;

(iv) a summary of the rationale for the award;

(v) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(vi) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(C) The debriefing may not include point-by-point comparisons of the debriefed offeror’s offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(D) Each solicitation for competitive proposals shall include a statement that information described in subparagraph (B) may be disclosed in post-award debriefings.

(E) If, within one year after the date of the contract award and as a result of a successful procurement protest, the agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers

or on the basis of new best and final offers requested for that contract, the agency shall make available to all offerors—

- (i) the information provided in debriefings under this paragraph regarding the offer of the contractor awarded the contract; and
- (ii) the same information that would have been provided to the original offerors.

(6)(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) only if that offeror requested and was refused a preaward debriefing under subparagraph (A).

(C) The debriefing conducted under subparagraph (A) shall include—

- (i) the executive agency's evaluation of the significant elements in the offeror's offer;
- (ii) a summary of the rationale for the offeror's exclusion; and
- (iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(D) The debriefing conducted under subparagraph (A) may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.

(8) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.

(9) If the head of an agency considers that a bid or proposal evidences a violation of the anti-trust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

(c) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—

- (1) when the appropriate officials of the Department are making an assessment of the most advantageous source for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a review of the availability and cost of each item of supply—

(A) through the supply system of the Department of Defense; and

(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adequate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

(d)(1)(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a development contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a production contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocurd in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurment of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a non-competitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded. Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.

(4)(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense unless the head of the agency determines that—

(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

(B) In considering offers in response to a solicitation requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

(e) PROTEST FILE.—(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31 and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

(f) AGENCY ACTIONS ON PROTESTS.—If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554(c) of title 31 within the limits referred to in paragraph (2) of such section.

(g) PROHIBITION ON RELEASE OF CONTRACTOR PROPOSALS.—(1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term “proposal” means any proposal, including a technical, man-

agement, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(Aug. 10, 1956, ch. 1041, 70A Stat. 130; Pub. L. 85–861, §1(44), Sept. 2, 1958, 72 Stat. 1457; Pub. L. 90–268, §3, Mar. 16, 1968, 82 Stat. 49; Pub. L. 98–369, div. B, title VII, §2723(b), July 18, 1984, 98 Stat. 1191; Pub. L. 98–525, title XII, §1213(a), Oct. 19, 1984, 98 Stat. 2591; Pub. L. 99–145, title XIII, §1303(a)(14), Nov. 8, 1985, 99 Stat. 739; Pub. L. 99–500, §101(c) [title X, §924(a), (b)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–153, and Pub. L. 99–591, §101(c) [title X, §924(a), (b)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–153; Pub. L. 99–661, div. A, title III, §313(b), title IX, formerly title IV, §924(a), (b), Nov. 14, 1986, 100 Stat. 3853, 3932, 3933, renumbered title IX, Pub. L. 100–26, §3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 100–456, div. A, title VIII, §806, Sept. 29, 1988, 102 Stat. 2010; Pub. L. 101–189, div. A, title VIII, §853(f), Nov. 29, 1989, 103 Stat. 1519; Pub. L. 101–510, div. A, title VIII, §802(a)–(d), Nov. 5, 1990, 104 Stat. 1588, 1589; Pub. L. 103–160, div. A, title XI, §1182(a)(5), Nov. 30, 1993, 107 Stat. 1771; Pub. L. 103–355, title I, §§1011–1016, title IV, §4401(b), Oct. 13, 1994, 108 Stat. 3254–3257, 3347; Pub. L. 104–106, div. D, title XLII, §§4103(a), 4104(a), title XLII, §4202(a)(2), div. E, title LVI, §5601(a), Feb. 10, 1996, 110 Stat. 643, 644, 653, 699; Pub. L. 104–201, div. A, title VIII, §821(a), title X, §1074(a)(11), (b)(4)(A), Sept. 23, 1996, 110 Stat. 2609, 2659, 2660; Pub. L. 106–65, div. A, title VIII, §821, Oct. 5, 1999, 113 Stat. 714.)

HISTORICAL AND REVISION NOTES 1956 ACT

<i>Revised section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
2305(a)	41:152 (less clause (b)).	Feb. 19, 1948, ch. 65.
2305(b)	41:152 (clause (b)).	§§2(d), 3, 62 Stat. 22.
2305(c)	41:151(d).	

In subsection (a), the word “needed” is substituted for the words “necessary to meet the requirements”.

In subsection (b), the words “United States” are substituted for the word “Government”.

1958 ACT

<i>Revised section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
2305	41:152(c).	Aug. 9, 1955, ch. 628, §15, 69 Stat. 551.

Reference to bids is omitted as surplusage (see opinion of the Judge Advocate General of the Army (JAGT 1956/9122, 21 Dec. 1956)). The word “attachments” is substituted for the words “material required”. The words “the specifications in” are inserted in the second sentence for clarity. The word “available” is omitted as covered by the word “accessible.” The words “no award may be made” are substituted for the words “and any award or awards made to any bidder in such case shall be invalidated and rejected”.

CODIFICATION

Pub. L. 99–591 is a corrected version of Pub. L. 99–500.

AMENDMENTS

1999—Subsec. (g)(1). Pub. L. 106–65 substituted “an agency named in section 2303 of this title” for “the Department of Defense”.

1996—Subsec. (a)(2). Pub. L. 104–106, §4202(a)(2), inserted “a procurement for commercial items using special simplified procedures or” after “(other than for”.

Subsec. (b)(4)(B). Pub. L. 104–106, §4103(a)(3), added subpar. (B). Former subpar. (B) redesignated (C).

Pub. L. 104-106, §4103(a)(1), transferred text of subpar. (C) to end of subpar. (B) and substituted “This subparagraph” for “Subparagraph (B)” at beginning of that text.

Subsec. (b)(4)(C). Pub. L. 104-106, §4103(a)(2), redesignated subpar. (B) as (C).

Pub. L. 104-106, §4103(a)(1), struck out “(C)” before “Subparagraph (B)” and transferred text of subpar. (C) to end of subpar. (B).

Subsec. (b)(5)(F). Pub. L. 104-106, §4104(a)(1), struck out subpar. (F) which read as follows: “The contracting officer shall include a summary of the debriefing in the contract file.”

Subsec. (b)(6). Pub. L. 104-106, §4104(a)(3), added par. (6). Former par. (6) redesignated (9).

Subsec. (b)(6)(B). Pub. L. 104-201, §1074(a)(11)(A), struck out “of this section” after “paragraph (5)” and “of this paragraph” after “subparagraph (A)”.

Subsec. (b)(6)(C). Pub. L. 104-201, §1074(a)(11)(B), substituted “subparagraph (A)” for “this subsection” in introductory provisions.

Subsec. (b)(6)(D). Pub. L. 104-201, §1074(a)(11)(C), substituted “under subparagraph (A)” for “pursuant to this subsection”.

Subsec. (b)(7), (8). Pub. L. 104-106, §4104(a)(3), added pars. (7) and (8).

Subsec. (b)(9). Pub. L. 104-106, §4104(a)(2), redesignated par. (6) as (9).

Subsec. (e)(3). Pub. L. 104-106, §5601(a), as amended by Pub. L. 104-201, §1074(b)(4)(A), struck out par. (3) which read as follows: “Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency’s protest file (the so-called ‘rule 4 file’) for protests to the General Services Board of Contract Appeals under section 111 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 759).”

Subsec. (g). Pub. L. 104-201, §821(a), added subsec. (g). 1994—Subsec. (a)(2). Pub. L. 103-355, §4401(b), substituted “a purchase for an amount not greater than the simplified acquisition threshold)” for “small purchases)” in introductory provisions.

Subsec. (a)(2)(A)(i). Pub. L. 103-355, §1011(a)(1), substituted “and significant subfactors” for “(and significant subfactors)” and “cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors” for “cost- or price-related factors, and noncost- or nonprice-related factors”.

Subsec. (a)(2)(A)(ii). Pub. L. 103-355, §1011(a)(2), substituted “and subfactors” for “(and subfactors)”.

Subsec. (a)(2)(B)(ii)(I). Pub. L. 103-355, §1011(a)(3), amended subcl. (I) generally. Prior to amendment, subcl. (I) read as follows: “a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), unless discussions are determined to be necessary; and”.

Subsec. (a)(3). Pub. L. 103-355, §1011(b), added par. (3) and struck out former par. (3), which read as follows: “In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, and prior experience of the offeror).”

Subsec. (a)(4). Pub. L. 103-355, §1011(b), added par. (4).

Subsec. (a)(5). Pub. L. 103-355, §1012, added par. (5).

Subsec. (b)(3). Pub. L. 103-355, §1013(a), substituted “transmitting, in writing or by electronic means, notice” for “transmitting written notice” and inserted at end “Within three days after the date of contract award, the head of the agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.”

Subsec. (b)(4)(B). Pub. L. 103-355, §1013(b), substituted “transmitting, in writing or by electronic means, no-

tice” for “transmitting written notice” and “, within three days after the date of contract award, shall notify, in writing or by electronic means,” for “shall promptly notify”.

Subsec. (b)(5), (6). Pub. L. 103-355, §1014, added par. (5) and redesignated former par. (5) as (6).

Subsec. (e). Pub. L. 103-355, §1015, added subsec. (e).

Subsec. (f). Pub. L. 103-355, §1016, added subsec. (f).

1993—Subsec. (b)(4)(A). Pub. L. 103-160 realigned margins of cls. (i) and (ii).

1990—Subsec. (a)(2)(A)(i). Pub. L. 101-510, §802(a)(1), inserted “(and significant subfactors)” after “significant factors” and substituted “(including cost or price, cost- or price-related factors, and noncost- or nonprice-related factors)” for “(including cost or price)”.

Subsec. (a)(2)(A)(ii). Pub. L. 101-510, §802(a)(2), inserted “(and subfactors)” after “those factors”.

Subsec. (a)(2)(B)(ii)(I). Pub. L. 101-510, §802(b), amended subcl. (I) generally. Prior to amendment, subcl. (I) read as follows: “a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and”.

Subsec. (a)(3). Pub. L. 101-510, §802(c), substituted “the evaluation factors and subfactors, including the quality of the product or services” for “the quality of the services”.

Subsec. (b)(1). Pub. L. 101-510, §802(d)(1), inserted “and make an award” after “competitive proposals”.

Subsec. (b)(3). Pub. L. 101-510, §802(d)(2), inserted “in accordance with paragraph (1)” after “shall evaluate the bids”.

Subsec. (b)(4)(A). Pub. L. 101-510, §802(d)(3)(A), substituted “competitive proposals in accordance with paragraph (1)” for “competitive proposals” in introductory provisions, added cls. (i) and (ii), and struck out former cls. (i) and (ii) which read as follows:

“(i) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

“(ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States.”

Subsec. (b)(4)(B) to (E). Pub. L. 101-510, §802(d)(3)(B)–(D), redesignated subpars. (D) and (E) as (B) and (C), respectively, substituted “Subparagraph (B)” for “Subparagraph (D)” in subpar. (C), and struck out former subpars. (B) and (C) which read as follows:

“(B) In the case of award of a contract under subparagraph (A)(i), the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only cost or price and the other factors included in the solicitation.

“(C) In the case of award of a contract under subparagraph (A)(ii), the head of the agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).”

1989—Subsec. (b)(4)(D). Pub. L. 101-189 inserted “cost or” after “considering only”.

1988—Subsec. (d)(1)(B). Pub. L. 100-456, §806(b), substituted “Proposals referred to in the first sentence of subparagraph (A) are” for “The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are”.

Subsec. (d)(2)(B). Pub. L. 100-456, §806(b), substituted “Proposals referred to in the first sentence of subparagraph (A) are” for “The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are”.

Subsec. (d)(3). Pub. L. 100-456, §806(a)(2), inserted provision that objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.

Subsec. (d)(4). Pub. L. 100-456, §806(a)(1), added par. (4).

1986—Subsec. (a). Pub. L. 99-500 and Pub. L. 99-591, §101(c) [§924(a)], Pub. L. 99-661, §924(a), amended subsec. (a) identically, in par. (2)(A)(i) striking out “(including price)” after “factors” and inserting “(including price)” and “(including cost and price)” and adding par. (3).

Subsec. (b)(4)(B). Pub. L. 99-500 and Pub. L. 99-591, §101(c) [§924(b)], Pub. L. 99-661, §924(b), amended subpar. (B) identically, inserting “cost or”.

Subsec. (b)(4)(E). Pub. L. 99-661, §313(b), added subpar. (E).

1985—Subsec. (b)(5). Pub. L. 99-145 aligned the margin of par. (5).

1984—Subsecs. (c), (d). Pub. L. 98-525 added subsecs. (c) and (d).

Catchline, subsecs. (a) to (d). Pub. L. 98-369 substituted “Contracts: planning, solicitation, evaluation, and award procedures” for “Formal advertisements for bids; time; opening; award; rejection” and completely revised the text to substitute a program using solicitation requirements covering military procurement for former provisions which had used the approach of utilizing formal advertisements, struck out former provisions which had directed that, except in cases where the Secretary of Defense had determined that military requirements necessitated the specification of container size, no advertisement or invitation to bid for the carriage of government property in other than government-owned cargo containers could specify carriage of such property in cargo containers of any stated length, height, or width, and carried forward into new subsecs. (a)(1)(A)(iii), (B)(i), and (b)(2) and (5) the content of former section.

1968—Subsec. (a). Pub. L. 90-268 inserted provision that, except in cases where the Secretary of Defense determines that military requirements necessitate such specification, no advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

1958—Subsecs. (b) to (d). Pub. L. 85-861 added subsec. (b) and redesignated former subsecs. (b) and (c) as (c) and (d), respectively.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by sections 4103(a), 4104(a), and 4202(a)(2) of Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of this title.

Amendment by section 5601(a) of Pub. L. 104-106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, Feb. 10, 1996, 110 Stat. 702.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-510, div. A, title VIII, §802(e), Nov. 5, 1990, 104 Stat. 1589, provided that:

“(1) Except as provided in paragraph (2), the amendments made by this section [amending this section] shall apply with respect to solicitations for sealed bids or competitive proposals issued after the end of the 120-day period beginning on the date of the enactment of this Act [Nov. 5, 1990].

“(2) The Secretary of Defense may require the amendments made by this section to apply with respect to solicitations issued before the end of the period referred to in paragraph (1). The Secretary of Defense shall publish in the Federal Register notice of any such earlier effective date.”

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99-500, §101(c) [title X, §924(c)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-153, Pub. L. 99-591, §101(c) [title X,

§924(c)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-153, and Pub. L. 99-661, div. A, title IX, formerly title IV, §924(c), Nov. 14, 1986, 100 Stat. 3933, renumbered title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273, provided that: “The amendments made by this section [amending this section] shall apply with respect to solicitations for sealed bids or competitive proposals issued after the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 18, 1986].”

EFFECTIVE DATE OF 1984 AMENDMENTS

Pub. L. 98-525, title XII, §1213(b), Oct. 19, 1984, 98 Stat. 2592, provided that: “The amendment made by subsection (a) [amending this section] shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act [Oct. 19, 1984].”

Amendment by Pub. L. 98-369 applicable with respect to any solicitation for bids or proposals issued after Mar. 31, 1985, see section 2751 of Pub. L. 98-369, set out as a note under section 2302 of this title.

GUIDANCE ON USE OF TIERED EVALUATIONS OF OFFERS FOR CONTRACTS AND TASK ORDERS UNDER CONTRACTS

Pub. L. 109-163, div. A, title VIII, §816, Jan. 6, 2006, 119 Stat. 3382, provided that:

“(a) GUIDANCE REQUIRED.—The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.

“(b) ELEMENTS.—The guidance prescribed under subsection (a) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract unless the contracting officer—

“(1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;

“(2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and

“(3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.”

AUTHORIZATION OF EVALUATION FACTOR FOR DEFENSE CONTRACTORS EMPLOYING OR SUBCONTRACTING WITH MEMBERS OF THE SELECTED RESERVE OF THE RESERVE COMPONENTS OF THE ARMED FORCES

Pub. L. 109-163, div. A, title VIII, §819, Jan. 6, 2006, 119 Stat. 3385, provided that:

“(a) DEFENSE CONTRACTS.—In awarding any contract for the procurement of goods or services to an entity, the Secretary of Defense is authorized to use as an evaluation factor whether the entity intends to carry out the contract using employees or individual subcontractors who are members of the Selected Reserve of the reserve components of the Armed Forces.

“(b) DOCUMENTATION OF SELECTED RESERVE-RELATED EVALUATION FACTOR.—Any entity claiming intent to carry out a contract using employees or individual subcontractors who are members of the Selected Reserve of the reserve components of the Armed Forces shall submit proof of the use of such employees or subcontractors for the Department of Defense to consider in carrying out subsection (a) with respect to that contract.

“(c) REGULATIONS.—The Federal Acquisition Regulation shall be revised as necessary to implement this section.”

CERTIFICATE OF COMPETENCY REQUIREMENTS

Pub. L. 102-484, div. A, title VIII, §804, Oct. 23, 1992, 106 Stat. 2447, provided that, in case of contract to be entered into pursuant to this chapter, other than pur-

suant to simplified procedures under section 2304(g) of this title, solicitation was to contain notice of right of bidding small business concern, in case of determination by contracting officer that concern was nonresponsible, to request Small Business Administration to make determination of responsibility under section 637(b)(7) of Title 15, Commerce and Trade, that if contracting officer determined that concern was nonresponsible, such officer was to notify concern in writing, of such determination, that concern had right to request Small Business Administration to make determination, and that, if concern desired to request such determination, concern was to inform officer in writing, within 14 days after receipt of notice, of such desire, and that, after being so informed, officer was to transmit request to Administration, or, if not so informed, officer was to proceed with award of contract, and contained provisions relating to effective and termination dates and report to be submitted to Congress, prior to repeal by Pub. L. 103-355, title VII, § 7101(b), Oct. 13, 1994, 108 Stat. 3367.

CONSTRUCTION OF 1984 AMENDMENT

Amendment by Pub. L. 98-369 as not superseding or affecting the provisions of section 637(a) of Title 15, Commerce and Trade, see section 2723(c) of Pub. L. 98-369, set out as a note under section 2304 of this title.

§ 2305a. Design-build selection procedures

(a) **AUTHORIZATION.**—Unless the traditional acquisition approach of design-bid-build established under chapter 11 of title 40 is used or another acquisition procedure authorized by law is used, the head of an agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

(b) **CRITERIA FOR USE.**—A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- (1) The extent to which the project requirements have been adequately defined.
- (2) The time constraints for delivery of the project.
- (3) The capability and experience of potential contractors.
- (4) The suitability of the project for use of the two-phase selection procedures.
- (5) The capability of the agency to manage the two-phase selection process.
- (6) Other criteria established by the agency.

(c) **PROCEDURES DESCRIBED.**—Two-phase selection procedures consist of the following:

- (1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's requirements (which may include criteria and preliminary design, budget param-

eters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with chapter 11 of title 40.

(2) The contracting officer solicits phase-one proposals that—

- (A) include information on the offeror's—
 - (i) technical approach; and
 - (ii) technical qualifications; and
- (B) do not include—
 - (i) detailed design information; or
 - (ii) cost or price information.

(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two—

- (A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and
- (B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with paragraphs (2), (3), and (4) of section 2305(a) of this title.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 2305(b)(4) of this title.

(d) **SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE TWO REQUESTS FOR COMPETITIVE PROPOSALS.**—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.